No. 11753.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES M. MOSCA, otherwise known as JAMES M. FLY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

OPENING BRIEF OF APPELLANT.

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Jurisdictional Statement.

This is an appeal from a Judgment of Conviction in the United States District Court for the Southern District of California on September 25, 1947, after trial before a jury, wherein the Appellant was found guilty on all twelve counts of an Indictment.

The first seven of the counts in the Indictment charged the Appellant with having violated Section 35(A) of the Federal Criminal Code, 18 U. S. C. A. 80, during October and November, 1946, in Los Angeles County, California, which section prohibits the making and using of a false bill, account, claim or certificate, knowing the same to contain a fraudulent or fictitious statement in a matter within the jurisdiction of any department or agency of the United States. [R. 2-7.]

In the remaining five counts of the Indictment, Appellant is charged with having willfully used and transferred

ration documents; namely, sugar ration checks, on different days in October and November, 1946, in Los Angeles County, California, in exchange for sugar, in a way and for a purpose not permitted by a ration order, in violation of General Ration Order 8, Sec. 2.6 (8 F. R. 3783), issued pursuant to the Second War Powers Act of 1942, Sec. 301, 50 U. S. C. A. App., Sec. 633. [R. 7-10.]

The jurisdiction of the District Court was based upon the Second War Powers Act of 1942, Sec. 301, 50 U. S. C. A. App., Sec. 633 (6).

This Court has jurisdiction to entertain this appeal under Sec. 128 of the Judicial Code as amended, 28 U. S. C. A. 225.

Statement of the Case.

The Appellant was convicted after trial before a jury in the United States District Court for the Southern District of California at Los Angeles, California, on September 25, 1947. [R. 13.] The jury found the Appellant guilty on all counts of a 12-count Indictment, the first seven counts of which purport to charge the Appellant with eight separate violations of Sec. 35 (A) of the Federal Criminal Code, 18 U. S. C. A. 80, and the remaining five counts of the Indictment purport to charge the Appellant with five separate violations of Sec. 2.6 of General Ration Order No. 8 (8 F. R. 3783) issued by the President through the Office of Price Administration, pursuant to 50 U. S. C. A. App. Sec. 633. [R. 2-10.]

Specifically, Count One of the Indictment charged that the Appellant, on or about November 11, 1946, in Los Angeles County, California, did knowingly and willfully make and use, and cause to be made and used, a

false bill, account, claim and certificate, to-wit: a sugar ration check, in the amount of 10,000 pounds of sugar, drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of the Appellant on behalf of the Italian American Import Co., knowing the same to contain a fraudulent and fictitious statement, and entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States Government; namely, sugar ration accounts kept pursuant to the provisions of Third Revised Ration Order 3 (11 F. R. 177) promulgated by said agency pursuant to law in that at said time and place, there was no sugar ration account in the name of the Appellant or the Italian American Import Co. in the Santa Monica and Vermont Branch of the Bank of America. [R. 2-3.]

Counts Two, Three, Four, Five, Six and Seven are similar to Count One except that the date of the offense charged is different and each count refers to a different sugar ration check. [R. 3-7.]

Count Eight charged that the Appellant, on or about November 30, 1946, in Los Angeles, California, willfully used and transferred ration documents, to-wit: two sugar ration checks drawn on the Santa Monica and Vermont Branch of the Bank of America, and bearing the signature, as maker, of the Appellant on behalf of the Italian American Import Co., purporting to transfer 2500 pounds of sugar each to Smart & Final Co., Ltd., Unit 65, 834 West Jefferson, Los Angeles, California, in exchange for 5000 pounds of sugar, in a way and for a purpose not permitted by a ration order, in that, at said time and place, there was no sugar ration account in the name of the Appellant or the Italian American Import

Co. in the Santa Monica and Vermont Branch of the Bank of America. [R. 7.]

Counts Nine, Ten, Eleven and Twelve are similar to Count Eight except for the date charged in each count, and each count refers to a different sugar ration check. R. 8-10.]

All of the offenses alleged in the Indictment are stated to have occurred on different dates in October and November, 1946.

Prior to trial, the Appellant moved to dismiss the Indictment and directed the motion particularly to the first seven counts of the Indictment which purported to charge a violation of 18 U. S. C. A. 80. This motion was denied by the Court, a plea of not guilty to each count was entered by the Appellant and the cause set for trial on July 22, 1947. [R. 11.]

The cause proceeded to trial on September 23, 1947 [R. 24], and was concluded on the following day when the jury returned a verdict of guilty on all twelve counts. [R. 12-13.]

At the conclusion of the case for the Government, the Appellant moved for a judgment of acquittal as to all counts of the Indictment, which motion was denied. [R. 130-146.] The Appellant renewed his motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure which motion came on for hearing on October 3, 1947, and was denied. [R. 14-15.]

The Court sentenced the Appellant to imprisonment of one year on each of the first seven counts of the Indictment, the sentence of Counts Two to Seven, inclusive, to run concurrently with the sentence on Count One, and to imprisonment for one year on Count Eight, the term

of imprisonment to run consecutively with the sentences on Counts One to Seven, inclusive, and Appellant was ordered to pay a fine of $10,000.00 on Count Nine, a fine of $5,000.00 on Count Ten, a fine of $5,000.00 on Count Eleven, and a fine of $5,000.00 on Count Twelve, to stand committed until the fines are paid. [R. 16-17.]

Notice of Appeal was filed on October 9, 1947. [R. 18.]

Summary of the Facts.

During 1946, Appellant, as the sole proprietor, operated three places of business in Los Angeles, California. At 4356 Sunset Boulevard the business was called the Italian-American Delicatessen. He had a cafe on Riverside Drive and a delicatessen at 8279 Santa Monica Boulevard. [R. 35, 68.]

Appellant's sugar ration account was carried at the Santa Monica and Vermont Branch of the Bank of America in the name of James M. Fly doing business as the Italian-American Delicatessen. [R. 63, 68, 84.] Appellant was registered with the Office of Price Administration in the name of James M. Fly doing business as the Italian-American Delicatessen. [R. 68.]

Although Appellant's sugar ration account at the Bank of America was in his name doing business as Italian-American Delicatessen Company, the bank charged the sugar ration checks, which are in evidence as Government's Exhibits 1 to 12, both inclusive, and signed Italian-American Import Company, to the sugar ration account of appellant. [R. 64, 106, 107.]

Government's Exhibits 1 to 12, both inclusive, purported to be sugar ration checks issued by Appellant on the Santa Monica Branch of the Bank of America and were signed Italian-American Import Company by James

M. Fly. Government's Exhibits 1 to 6, both inclusive, were written by Appellant and transferred to one William H. Austin, manager of Unit W for Smart & Final Company. [R. 30.] Government's Exhibit No. 7 was signed by Appellant and delivered to the witness Honigs, who, in turn, delivered it to the witness Walsma. [R. 40.] Government's Exhibits 8 to 12, both inclusive, were received by the witness Ripley, manager of Unit 65 for Smart and Final Company. [R. 51.]

Lawrence M. Taylor, special agent of the Office of Price Administration, told Snodgress, employee at the Bank, that Snodgress ought to recompute the figures on Government's Exhibit 13 because he, Taylor, stated that the checks did not belong in that account. [R. 102.] After the conversation with Taylor, Snodgress recomputed the figures on Government's Exhibit 13. [R. 99-104.] Snodgress testified that he corrected the figures on Government's Exhibit 13 based on what Taylor told him. The witness Snodgress indicated what figures he had placed on Government's Exhibit 13 after talking to Taylor by marking a line across the page at the top, being the original record, and the bottom the corrected part. [R. 93-4.]

Evidence was introduced over the objection of the Appellant by the witness Fred Peterson to the effect that from about the first of 1946 up to the end of October, 1946, the Appellant had an understanding with the witness, who was then an employee of the Bank of America and in charge of sugar ration accounts at the Santa Monica and Vermont branch of said Bank, whereby Peterson would set up fictitious deposits in the account of the Italian-American Delicatessen with the Bank of America and would destroy sugar ration checks drawn by the Appellant when they came into the Bank so that the record

would show a balance in the account at all times and not an overdraft. [R. 116-124.]

The Appellant took the stand in his own defense and produced Defendant's Exhibits A-1 and A-2, which were received in evidence.

Defendant's Exhibit A-1 is the letter from the Office of Price Administration to the Italian-American Delicatessen Company, dated February 10, 1947, which advised that Appellant's account in the Bank of America had a balance of 1,490 lbs. of sugar on February 8, 1947, at the time when the account was closed. Exhibit A-2 is the envelope showing the registered mail stamp in which Exhibit A-1 was received by Appellant.

Specifications of Error.

I.

The District Court erred in denying Appellant's Motion to Dismiss the Indictment.

II.

The District Court erred in denying Appellant's Motion for a Judgment of Acquittal made under Rule 29 of the Federal Rules of Criminal Procedure.

III.

The District Court erred in admitting the testimony of Fred Peterson, a witness for the Government, concerning alleged arrangements he made with Appellant to destroy checks.

IV.

The District Court erred in instructing the jury that the sugar ration checks involved in the first seven counts of the Indictment were bills or claims under Section 80, Title 18, U. S. C. A.

ARGUMENT.

SPECIFICATION OF ERROR I.

The District Court Erred in Denying Appellant's Motion to Dismiss the Indictment.

Under specification of error II, Appellant has, in addition to the other points raised there, also presented substantially the same argument respecting the sufficiency of the indictment as was made in support of the Motion to Dismiss, and it is, therefore, adopted here.

SPECIFICATION OF ERROR II.

The District Court Erred in Denying Appellant's Motion for a Judgment of Acquittal Made Under Rule 29 of the Federal Rules of Criminal Procedure.

The first seven counts of the Indictment purported to charge offenses under Section 80 of Title 18, U. S. C. A. It was the theory of the Government that Appellant made and used a false bill, account, claim or certificate by having signed a sugar ration check Italian-American Import Co. by James M. Fly knowing that the same contained a fraudulent and fictitious statement or entry in a matter within the jurisdiction of the Office of Price Administration, an agency of the United States, because there was no sugar ration account in the name of Appellant or the Italian-American Import Co. in the Bank of America. Appellant contended that a sugar ration check, whether or not drawn on Appellant's account, was not a false bill, account, claim or certificate within the meaning of Section 80.

The pertinent part of this section provides as follows:

> "* * * or whoever shall knowingly and willfully * * * make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined * * *."

In order for the sugar ration checks upon which the first seven counts of the Indictment are predicated to fall within the purview of Section 80 of Title 18, U. S. C. A., they must necessarily be, as charged, a false bill, account, claim or certificate. It was not contended by the Government that a ration check would be included within the terms "account" or "certificate," and the District Court instructed the jury that a sugar ration check of the type involved in the first seven counts of the Indictment "is a bill or claim under the law under which these counts are drawn." [R. 162.]

It thus appears that the sufficiency of the Indictment, in so far as the first seven counts are concerned, depends upon the interpretation of the terms "bill" or "claim." If a sugar ration check is neither, no offense is stated.

On the argument for the Motion to Dismiss, counsel for the Government, and, as a matter of fact, Appellant's counsel argued the Motion almost entirely respecting the interpretation which should be placed upon the term "bill." Later in the trial, as heretofore mentioned, the District Court instructed the jury that such checks were either a bill or claim.

It is the contention of Appellant that a sugar ration check is not a bill or a claim within the meaning of the statute. No support for the Government's position is found in any permissible or reasonable interpretation of the terms "bill" or "claim" or in the legislative history of the section in question.

The history of Section 80 discloses that the section, in its present form, has developed from a series of amendments to the original act of March 2, 1863, Ch. 67, 12 Stat. 696, the pertinent part of which provides as follows:

> "Any person in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war, who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent; any person in such forces or service who shall, for the purpose of obtaining, or aiding in obtaining the approval or payment of such claim, make, use, or cause to be made or used, any *false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit,* or *deposition,* knowing the same to contain any false or fraudulent statement or entry, * * *." (Emphasis supplied.)

This original Act was not amended until May 30, 1908, R. S. 5438, Ch. 235, 35 Stat. 555, when it provided as follows:

> "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil,

> military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent; or whoever for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any *false bill, receipt, voucher, roll, account, claim, certificate, affidavit* or *deposition,* knowing the same to contain any fraudulent or fictitious statement or entry; or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, etc."

It is noted that the changes by the amendment of May 30, 1908, extended the statute to "every person," doing away with the limitation of applicability contained in the original statute to any person "in the land or naval forces of the United States, or in the militia in actual service of the United States, in time of war," and further the presentation of any claim was extended to a "person or officer" in the naval as well as the civil or military service. Also, the word "entry" was dropped from the proscribed categories obviously to avoid repetition, since it appeared in subsequent language. Also, a conspiracy clause was added.

This Act was further amended on March 4, 1909 (Ch. 321, 35 Stat. 1095), by Section 35 of the Criminal Code. The pertinent portion of the section was not changed further by the Act of March 4, 1909, except to substitute the word "Whoever" for "Every person" at the beginning.

By the Act of October 23, 1918 (Ch. 194, 40 Stat. 1015), the section was further amended.

By this amendment, the Act was extended to include the presentation of any claim to any department of the Government of the United States "or any corporation in which the United States of America is a stockholder" and the provision was added "or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact * * * shall be fined * * *."

The section was further amended by the Act of June 18, 1934, Ch. 587, 48 Stat. 996, by the addition of the words making it an offense to make or cause to be made a false statement or representation "in any matter within the jurisdiction of any department or agency of the United States." The Act, as amended April 4, 1938, Ch. 69, 52 Stat. 197, is the present law as used in the first seven counts of the Indictment. The last amendment, however, did not change the Act as amended June 18, 1934, except for a slight change in punctuation.

It is significant that from its inception there was no change in this legislation in so far as the description of the documents proscribed are concerned. The Act has always referred to a "bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition."

In the case of *United States v. Gilliland,* 312 U. S. 86, 85 L. Ed. 598, the Supreme Court considered the Act involved here, and there held that it applied to the submission of false affidavits and reports required to be kept and submitted to the Department of the Interior under the Act of February 22, 1935, 49 Stat. at L. 30, 31, Chap. 18, 15 U. S. C. A., Sections 715-715d, commonly called the "Hot Oil" Act. In that case, the Court pointed out at page 95 of the opinion that the amendment of April 4, 1938, was sought by the Department of the Interior to aid in the enforcement of laws relating to its functions and, in particular, to the enforcement of regulations under Section 9(c) of the National Industrial Recovery Act of June 16, 1933, 48 Stat. at L. 195, 200, Chap. 90.

The letter dated February 7, 1934, directed to the Chairmen of the Judiciary Committees of the Senate and House by the Secretary of the Interior referred to in the opinion in the *Gilliland* case, bears out the conclusion of the Court concerning the reason for the amendment of June 18, 1934.

The "sugar ration checks" referred to in the first seven counts of the Indictment were checks issued pursuant to 50 U. S. C. A. App. 633(2) and Third Revised Ration Order No. 3. (See Appendix.)

As the statute now stands, one of the offenses defined is that of wilfully making or using a false bill or claim in any matter within the jurisdiction of any department or agency of the United States. It must, therefore, be determined whether a sugar ration check is a bill or claim within the meaning of the statute.

The word "bill" has many meanings in law, depending upon words used in conjunction therewith, such as bill of discovery, bill of information, bill of review, bill of indictment, bill of sale, bill of exchange, bill of particulars, bill of rights, and many more.

A check such as those referred to in the first seven counts of the indictment is not a "bill of exchange," which is the only type of "bill" to which it can be said with reason to have even remote application, because it does not contain a promise or order to pay a sum certain *in money.* This requirement of a bill of exchange is specifically mentioned in the definition of a "bill of exchange" contained in Section 3207 of the Civil Code of California, which provides:

> "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain *in money* to order or to bearer." (Emphasis supplied.)

This requirement of a "bill of exchange" is recognized in a number of cases in the Federal Courts. *Nathan v. State of Louisiana,* 49 U. S. 73, 12 L. Ed. 993; *United States v. Bank of United States,* 46 U. S. 382, 12 L. Ed. 199; *Shaw v. Merchants National Bank of St. Louis,* 101 U. S. 557, 25 L. Ed. 892; *Wilson v. Buchenau,* 43 Fed. Supp. 272.

In Volume 10, Corpus Juris Secundum at page 381, the word "bill" is defined as follows:

> "The word 'bill' is one of the most general that can be used, and has a meaning depending on the subject matter to which it is applied. It has been

said to be a word of legal import, and has been generally defined or employed as meaning a formal statement of particular things, in writing.

"More specifically, in what may be called its commercial sense, it has been defined as an account of charges and particulars of indebtedness by the creditor to his debtor, in this sense being held synonymous with, or equivalent to, 'charge,' 'claim,' 'demand,' and 'invoice.' In a somewhat different application, but still in a commercial or mercantile sense, as a medium of payment, 'bill' has been defined as bank note; bank paper; paper money; also as a common engagement for money, given by one man to another; a note for the absolute payment of money under seal; an order drawn by one person on another to pay a third a certain sum of money absolutely and at all events; the term, in this latter application, being further defined and distinguished from other terms in Bills and Notes, §§4-7."

See:

Black's Law Dictionary (3d ed.), pp. 216-222;

Bouvier's Law Dictionary (Rawle's 3d Revision), pp. 344-365.

It appears from the history of this Act that Congress intended by the use of the word "bill" to mean a "bill" in the sense of an invoice, involving a claim for money of something of value, not a "bill of exchange" or such a document as is involved here. An extension of the meaning of the word "bill" to include any check, whether strictly a bill of exchange or not, which may be addressed to the Federal government on a non-existent account or upon an account that is overdrawn, would be to give to

this section an unreasonable meaning and certainly beyond the intention of Congress in passing the legislation.

From the foregoing, it appears that, if a sugar ration check is to be brought within the meaning of any of the terms set forth in the Statute, it would necessarily have to be that of a "claim." Nothing in the history of the Section or in any of the adjudicated cases indicates that a claim has been construed other than a demand for money or for something of value from the United States.

"Claim" has been defined by the Supreme Court as "The assertion of a liability to the party making it to do some service or pay a sum of money."

> *Prigg v. Pennsylvania,* 16 Pet. (U. S.) 539, 10 L. Ed. 1060.

In the case of *United States v. Cohn* (1926), 270 U. S. 339, 70 L. Ed. 616, the Supreme Court had before it for interpretation the act involved here as amended in 1918. In that case, the Defendant was charged with having caused false statements to be made to the customs service wherein he obtained unlawful possession of some cigars from the Collector of Customs. At pages 345, 346 of the opinion, the Court stated:

> "While the word 'claim' may sometimes be used in the broad juridical sense of 'a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty' (Prigg v. Pennsylvania, 16 Pet. 539, 615, 10 L. Ed. 1060, 1089), it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the government relates solely

> to the payment or approval of a claim *for money or property to which a right is asserted against the government, based upon the government's own liability to the claimant.* And obviously it does not include an application for the entry and delivery of nondutiable merchandise, as to which no claim is asserted against the government, to which the government makes no claim, and which is merely in the temporary possession of an agent of the government for delivery to the person who may be entitled to its possession. This is not the assertion of a 'claim upon or against' the government, within the meaning of the statute; and the delivery of the possession is not the 'approval' of such a claim." (Emphasis supplied.)

The lower court took the position that a sugar ration check, such as set forth in the first seven counts of the Indictment, was a claim within the meaning of Section 80. The reasoning appeared to be that a ration check is a demand addressed to a bank to transfer from the drawer's account a certain amount of sugar and that, as such, it is a claim just as much as if it were a claim for money. [R. 139.] The error in this process of reasoning appears to result from a false major premise—namely, that a check is a demand addressed to the bank to transfer sugar from a person's account when such is not the case. A ration account does not have sugar in it; it merely has ration points which, in turn, are merely units representing a type or kind of authorization by the Government.

Ration banking was set up as a method or system of rationing by the use of a checking account and the accounting in connection with rationing was supposedly made

SPECIFICATION OF ERROR III.

The District Court Erred in Admitting the Testimony of Fred Peterson, a Witness for the Government, Concerning Alleged Arrangements He Made With Appellant to Destroy Checks.

The witness, Fred Peterson, was called by the Government during the case-in-chief and testified that he was employed by the Bank of America, Santa Monica and Vermont Branch, as assistant cashier and chief clerk. He testified to a series of conversations he had with Appellant which began during the early part of 1946 and continued up to October, 1946. These conversations tended to show that the witness and Appellant first agreed that the witness would make fictitious deposits to Appellant's account and that later he decided it was easier to destroy checks drawn by Appellant on the account. All of these conversations occurred several months prior to the date of the offenses charged in the Indictment. The following occurred [R. 114-119]:

> "Q. Where are the places at which you had conversations with him? A. Usually—well, at his store or when he would come in the bank.
>
> Q. And by store do you mean his delicatessen store? A. Yes, sir.
>
> Q. You also talked to him in the bank? A. Yes, sir.
>
> Q. Do you recall seeing him at any other place? A. Oh, yes, I was with him several other places.
>
> Q. Well, what other places do you now recall? A. Well, we would go out to dinner in the evening —things like that.
>
> Q. Does Mr. Fly have more than one place of business? A. Yes, sir.

Q. Did you see him at any of the other places of business? A. Yes, sir.

Q. All right. Now, coming back to the earliest conversation that you can recall in the first part of 1946, can you recall who was present at the conversation? A. I don't believe anyone would be present.

Q. And you cannot now recall whether the first conversation occurred—can you recall where it did occur? A. No, sir.

Q. Will you relate that conversation?

Mr. Carr: I would like to have a date fixed.

Q. By Mr. Bell: Can you fix the date any closer? A. January or February, probably—the early part of 1946.

The Court: All right.

Q. By Mr. Bell: What was the conversation you had with him?

Mr. Carr: Object to that on the ground the conversation took place prior to the offense charged, your Honor.

Mr. Bell: This, your Honor, shows a continuing course of conduct. The conversation we intend to show was where the arrangements were made and they were continuously acted upon throughout the rest of the year.

The Court: I will reserve a motion to strike if it is not connected up.

Q. By Mr. Bell: What was the conversation, Mr. Peterson? A. In regard to the sugar account which was overdrawn at the time?

Q. Yes, what did he say and what did you say? A. He asked me if I could credit the account. I told him I could and I did.

Q. What did you do? A. Well, I credited the account with a phoney deposit.

Q. Do you recall how much it was?

Mr. Carr: I move to strike the word 'phoney.' 'Phoney' is a lingo that I don't understand.

The Court: You had better explain what you mean.

The Witness: Well, it was an invalid deposit.

Q. By Mr. Bell: Do you recall how much the deposit was? A. No.

Q. When you say it was invalid what do you mean by that? A. Well, I just—

Mr. Carr: I object to this on the ground it is asking for the witness' conclusion.

Mr. Bell: I am asking him to interpret the meaning of his word. You objected to the word he used.

Mr. Carr: I will ask the word 'invalid' be stricken, too.

The Court: He is trying to explain what he means by it. Go ahead.

The Witness: I just made it up. There was actually no credit there.

Q. By Mr. Bell: Did you make up the amount of the credit? A. Yes, sir.

Q. How about the date? Did you make that up? A. Yes, sir.

Q. And anything else on the entry that you made? A. Well, probably a transit description.

Q. And when you made that what did you put that entry upon—what kind of paper—what was the form? A. A regular sugar deposit slip.

Q. Merely as an illustration of the form and not pertaining to the figures thereon at all, did it re-

semble the form of deposit slip here which is Government's Exhibit 7-8? A. Yes.

Q. Did it read as this one does, the ration deposit slip: 'The United States of America, Office of Price Administration, Sugar Credits Deposited in' and then the name of the bank? A. Yes, sir.

Q. Did you have any other conversations around that time with Mr. Fly?

Mr. Carr: I am going to object to this line of questioning, your Honor, on the ground it is highly prejudicial. It does not relate to any issue involved in the case. It doesn't go to show intent with respect to the charge in the indictment, to-wit, that there was no bank account on which these checks were issued.

The Court: Objection overruled."

The witness was asked to relate other conversations with Mr. Fly with respect to fictitious deposits and the substance of his testimony was similar to that given above. The witness was then questioned as to conversations with Mr. Fly concerning ration checks. The testimony ran as follows [R. 118]:

"Q. The discussion as to the checks. Were any of those held in his place of business? A. The discussions were, yes, sir.

Q. Were any of them held at the bank? A. Yes, sir.

Q. What was the earliest discussion that you now recall concerning checks? A. Well, I couldn't say just when, only I decided that it was easier to destroy the checks than it was to make the invalid deposit.

Q. Did you have any conversation with him along that line? A. Yes. We talked about it.

Q. Now, as nearly as you can recall what did you say and what did he say?

Mr. Carr: I am going to object again, your Honor, the same objection. This is purporting to show, I assume, similar offenses and I object on the ground that they are not similar offenses. That testimony is prejudicial to this defendant and does not involve the charges in the indictment.

Mr. Bell: One of the charges in the indictment is that he willfully and unlawfully and knowingly wrote these checks and that there was no mistake about it.

The Court: Objection is overruled."

Each of the twelve counts in the Indictment charges a separate and distinct offense—namely, that of issuing a check on a named date on a non-existent sugar ration account. The gist of the offense charged was the issuance of a sugar ration check knowing that no account existed in the name on which the check was drawn. The fact that the first seven counts charged a violation of Section 80 of Title 18, U. S. C. A., and the remaining five counts a violation of Section 2.6 of General Ration Order No. 8 is of no importance in so far as the question of intent is concerned. In all of the counts of the Indictment, it was necessary for the Government to prove a specific willful intent on the part of Appellant to issue checks on an account which did not exist. At no time during the case did Appellant contend that he did not issue and sign each and every one of the checks set forth in each count of the Indictment. As a matter of fact, Appellant raised no objection to the admission of the checks alleged in the Indictment except on the ground of the failure of the first seven counts to state an offense under

Section 80. On the contrary, Appellant cooperated with the Government and permitted the introduction in evidence of such checks without requiring that counsel lay the foundation usually required. [R. 33, 41, 52.]

Each of the counts in said indictment relates to a different transaction, making a total of twelve different checks and twelve different occasions.

As the Record reveals, the testimony elicited from Mr. Peterson was offered and introduced over the strenuous objection of Appellant in order to show Appellant's willful intent at the time of the commission of the specified acts in issue. The basis for the reception of this collateral and highly prejudicial evidence appeared to be that these conversations between Mr. Peterson and the accused constituted similar offenses which were admissible to prove the intent of the accused with respect to the charges in the indictment.

The fundamental rule of criminal law is that guilt of another offense cannot generally be proved to show guilt of the offense charged in the indictment. Appellant recognizes also the rule that evidence of similar offenses may be admitted in some cases for the purpose of showing intent.

Appellant contends, however, that there must be similarity in the offenses sought to be introduced under these circumstances with the specific offense before the trial court. There is an ever-present danger that such evidence of collateral matter will tend to draw the attention of the jury away from the consideration of the real issues of the trial and, as the 8th Circuit Court in *Paris v. United States,* 260 Fed. 529, 531, said, "to fasten it upon other questions, and to lead them unconsciously to

render their verdicts in accordance with their views on false issues rather than on the true issues on trial." It is respectfully submitted that this testimony does not fall within the exception to the general rule, inasmuch as the testimony of Mr. Peterson had no conceivable relationship to the element of intent alleged in the specific charges of the indictment.

The foundation of the rule which allows in evidence collateral proof of similar offenses to show intent, is that if a man does an act with a given intent, it is more or less likely that when he does a similar act, he does it with a similar intent. There are many acts such as passing counterfeit money or uttering forged documents which are the less likely to be innocent the more often they are repeated. In various circumstances, therefore, evidence of earlier acts may be admitted as tending to show a man's state of mind at the time he commits a later fraud. The mere fact, however, that intent is an issue is not enough to let in evidence of similar acts unless they are so connected with the offenses charged in point of time and circumstances *as to throw light upon the intent.* Such offer of proof of similar offenses endeavors only to eliminate any innocent explanation of the offense charged by showing that at some other time a like act has been done under similar circumstances. The full effect of such proof goes only to show that the oftener a like act has been done, the less probable it is that it could have been done innocently.

Wigmore states the rule in this manner in Vol. II, 3d Ed., Sec. 302, p. 200:

> "The argument is based purely on the doctrine of chances, and it is the mere repetition of instances,

and not their system or scheme, that satisfies our logical demand.

"Yet, in order to satisfy this demand, it is at least necessary that prior acts should be *similar*. Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instance. Suppose the blowing up of an American warship in Havana Harbor to be in question; the blowing up of various ships of various other nations in the preceding fifty years would have no significance as to the accidental nature of the occurrence (except to show that such an accident is possible); the blowing up of an American warship in the preceding year in Algiers would have scarcely more significance; but the blowing up of an American warship in the same year in Cadiz or in the same harbor of Havana would have striking significance. So, where the intent of an erroneous addition in a bookkeeper's accounts is in issue, the erroneous addition of a bill rendered to a former employer ten years before would have no significance, because it is still within the limits of ordinary casual error that such things should occur at intervals; but several other erroneous additions in the bookkeeper's own favor in the same year and the same book of accounts go to exclude the explanation of casual error, and leave deliberate intent as the more probable explanation. In short, there must be a similarity in the various instances in order to give them probative value,—as indeed the general logical canon requires."

In short, there must be a distinct similarity of the collateral offenses with the crimes charged in the indictment to justify the introduction of such collateral evidence to prove fraudulent intent. To allow the prosecu-

tion to invoke this rule as justification for its introduction of the testimony of Fred Peterson, is to stretch the rule beyond all reasonable bounds.

The substance of Mr. Peterson's testimony throws no light whatsoever on the issue of Appellant's intent at the time he committed the various acts charged to him in the indictment, nor does such testimony give any indication that Appellant contemplated doing the alleged acts charged in the indictment. This testimony served no other purpose but to bring into sharp focus a collateral, independent offense, the effect of which was to create in the minds of the jurors a presumption of guilt rather than of innocence of the Appellant to the specific offenses charged in the indictment.

Clearly, the enormity of the wrong to Appellant by admission of this damaging testimony is apparent. Speaking of evidence of other similar offenses, the Circuit Court of Appeals of the First Circuit in *Fish v. United States* (1st Cir.), 215 Fed. 544, 549, warns the zealous prosecutor of the perils of such proof:

> "Evidence of this character necessitates the trial of matters collateral to the main issue, *is exceedingly prejudicial, is subject to be misused and should be received, if at all, only in a plain case.*" (Emphasis supplied.)

Evidence of a fact which goes to prove a substantive distinct offense other than that for which the Defendant is accused, as does the testimony of Mr. Peterson, is mere propensity evidence, and such evidence is excluded under any form of the rule, for evidence is irrelevant if its only probative force and value is to show disposition to commit the crime or crimes charged.

Said the Court in *State v. Lyle,* 118 S. E. 803, 807:

> "Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine. The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime. But the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. *Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected."* (Emphasis supplied.)

To put it another way Appellant's contention that the District Court erred in admitting the testimony of Fred Peterson concerning alleged arrangements he made with Appellant to destroy checks, attention is directed to the following quotation from the article, EXCLUSION OF SIMILAR FACT EVIDENCE: AMERICAN, 51 Harvard Law Review 988, 1007:

> "The mental process behind this is rarely explicit, but it may be stated somewhat as follows: 'An exception to the general rule of exclusion is where the

other offenses are put in "to show intent." Here the prosecution offers to put in such evidence to show intent. Hence the evidence is admissible.' Obviously what has happened here is that the meaning of 'to show intent' has changed from 'relevant to show intent' to 'for the purpose of showing intent.' A slight variation of this is where the exception is stated as being 'on the issue of intent.' Then the mental process would be: 'There is here an issue of intent. Therefore other offenses are admissible.' These wanderings from the basic principles of the law are made possible by the spurious form of the rule, and they result in the admission of evidence of similar offenses which is not even *relevant* to one of the excepted categories of issues. All that such evidence is then relevant to, is the evil disposition of the accused and, behold, the bottom has dropped entirely out of this branch of the law."

If the testimony of the witness Peterson was believed by the jury, then obviously it tended to prove the existence of a conspiracy between the witness and Appellant to violate various provisions of various ration orders promulgated by the O.P.A.—more specifically those provisions relating to ration banking. The testimony did not tend to establish specific willful intent to issue the checks in question upon an account not in existence. It thus results that the testimony of Peterson tended to prove the existence of an independent and different crime from the offenses charged in the Indictment, and such testimony was irrelevant upon any theory and particularly upon the premise that it proved intent. Furthermore, there can be no question but that the testimony of Peterson was highly prejudicial and operated to the detriment of the Appellant.

SPECIFICATION OF ERROR IV.

The District Court Erred in Instructing the Jury That the Sugar Ration Checks Involved in the First Seven Counts of the Indictment Were Bills or Claims Under Section 80, Title 18, U. S. C. A.

The District Court instructed the jury as follows:

> "The court instructs you that a sugar ration check of the type involved in the first seven accounts of the indictment is a bill or claim under the law under which these counts are drawn." [R. 162.]

It is at once apparent that the objection to this instruction raises the same point heretofore made in challenging the sufficiency of the first seven counts of the Indictment both by way of the Motion to Dismiss and by the Motion for Judgment of Acquittal under Rule 29 of the Federal Rules of Criminal Procedure. For that reason the argument heretofore advanced is applicable and is here adopted without repeating it at this place.

Conclusion.

It is respectfully urged that the matters presented herein warrant this court in setting aside the conviction of Appellant on each and every count.

Respectfully submitted,

CHARLES H. CARR,

Attorney for Appellant.

APPENDIX.

Second War Powers Act.

50 U. S. C. A., App. Sec. 633(2).

"Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * * * * * *

"(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

Section 80, Title 18, U. S. C. A.:

"Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall

knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Sec. 2.6, General Ration Order No. 8:

"*Acquisition, use, transfer or possession of ration document.* No person shall acquire, use, permit the use of, transfer, possess or control a ration document except the person or the agent of the person to whom such ration document was issued or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order."